86-505

No.

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LUBBOCK INDEPENDENT SCHOOL DISTRICT,
Petitioner

v.

THE TEXAS EDUCATION AGENCY,
TEXAS COMMISSIONER OF EDUCATION, and
THE UNITED STATES OF AMERICA,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPLICATION FOR WRIT

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QUESTION PRESENTED

Whether a state previously found responsible for segregration in its public schools may be required to reimburse the local school districts for costs incurred in remedying the unconstitutional condition.

LIST OF PARTIES TO PROCEEDING BELOW

The Lubbock Independent School District, as Appellant, and the Texas Education Agency, the Texas Commissioner of Education, and the United States of America, as Appellees, appeared as parties before the United States Court of Appeals for the Fifth Circuit.

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NO.

IN THE

Supreme Court of the United States

October Term, 1986

LUBBOCK INDEPENDENT SCHOOL DISTRICT,
Petitioner

v.

THE TEXAS EDUCATION AGENCY,
TEXAS COMMISSIONER OF EDUCATION, and
THE UNITED STATES OF AMERICA,
Respodents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Lubbock Independent School District hereby petitions for a writ of certiorari to review the judgment of the court of appeals.

I.

OPINIONS BELOW

The opinion of the court of appeals is reported at 790 F.2d 1262 and that of the district court, which is unpublished, is attached as Appendix A.

II.

JURISDICTION

The judgment from which certiorari is sought was entered on June 4, 1986. The appellate court's order denying rehearing was entered on July 3, 1986. Copies of the judgment and order denying rehearing are attached as Appendix B and C, respectively. Section 1254(1) of 28 U.S.C. confers upon this court jurisdiction to review the judgment in question.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution states that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Article seven, section seven of the Texas Constitution prior to repeal in 1969 stated that:

> Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.

Article 2654-5, section five of the Texas Revised Civil Statutes prior to repeal in 1969 stated that:

> It shall be the duty of the Commissioner of Education to observe and execute the mandates, prohibi-

tions, and regulations established by law, or by the State Board of Education in accordance with law.

Article 2900 of the Texas Revised Civil Statutes prior to repeal in 1969 stated that:

> All available public school funds of the State shall be appropriated in each county for the education alike of white and colored children, and impartial provisions shall be made for both races. No white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The terms "colored race" and "colored children", as used in this title, include all persons of mixed blood descended from Negro ancestry.

Article 2900a of the Texas Revised Civil Statutes prior to repeal in 1969 is attached as Appendix D.

IV.

STATEMENT OF THE CASE

On August 7, 1970, and pursuant to 42 U.S.C. §2000c-6(a)(1), the United States of America initiated suit against the Texas Education Agency and its Commissioner of Education, Dr. J. W. Edgar (TEA), the Lubbock Independent School District and its superintendent (LISD), and various other Texas school districts. The complaint alleged that the LISD assigned students and faculty to schools in accordance with *"an official state policy* requiring racial segregation in the public schools of Texas...." (emphasis supplied). It further alleged that the state's unconstitutional conduct "resulted in the continued operation of [Texas] schools as dual systems based upon race."

The causes against the Defendants were subsequently severed. Those involving the TEA and the LISD were transferred to the United States District Court for the Northern District of Texas, Lubbock Division, for trial.[1]

The evidence presented at trial supported the United States' arguments. Recognizing this, the lower court entered findings of fact holding certain of LISD's schools as unconstitutionally segregated. Specifically, it found that Dunbar High School "was operated as a segregated black school under the laws that existed in the State of Texas prior to Brown I." *See* August 26, 1970 Memorandum Opinion attached as Appendix E at 3.[2] Moreover, Dunbar, which was "traditionally operated as a segregated black school under the laws of the State of Texas", *id.* at 3, "remain[ed] segregated *because* of pre 1954 laws and practices...." *Id.* at 5. (emphasis supplied).

Other levels of education within the LISD also felt the sting of state mandated segregation. Struggs Junior High School "too, remain[ed] as a segregated black school because it in effect took over the grades of 7 and 8 of the Old Dunbar operation." *Id.* at 9. It "too, [was] a remainder and vestige of the dual operation in existence prior to 1954...." *Id.* Additionally, Wheatley Elementary School "was built in 1946 for a projected student body that would be wholly Negro...[and] perpetuated a segregated system that existed at the time [of]...Brown I." *Id.* at 13.

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[1]The Texas Education Agency was a party defendant in each of the severed causes.

[2]The pre-*Brown v. Board of Education*, 347 U.S. 483 (1954) laws referred to mandated the segregation of blacks, *See* TEX. CONST. art. 7 § 7 (Vernon's 1955); TEX. REV. CIV. STAT. ANN. art. 2900 & 2900a (Vernon's 1965). Because of those laws, blacks were assigned to separate education facilities in the LISD. The district court in *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970) *aff'd*, 447 F.2d 441 (5th Cir. 1971) entered findings in a separate cause similar to those below. Accordingly, other courts adjudicated Texas responsible for black segregation throughout the Texas school system. *Id.* at 1046, 1047, 1050, 1052, & 1057.

Lastly, Ella Isles Elementary School also "existed as part of the dual system prior to 1954 and constitute[d] a remaining vestige of an illegally constituted and operated elementary school..." *Id.*[3] Because of these findings, the court ordered the LISD to desegregate and retained jurisdiction over the matter.

Unsatisfied with the district's progress, the United States moved the trial court for further relief in 1977. In addition to the four facilities previously mentioned, the court found other LISD schools to be unlawfully segregated. *United States v. Lubbock Independent School District,* 455 F. Supp. 1223 (N.D. Tex. 1978) *aff'd,* 601 F.2d 585 (5th Cir. 1979). In rectifying the original and subsequent segregation, the school district expended approximately $9,000,000.00 as of the 1983-84 school year.[4]

Believing itself entitled to reimbursement from the TEA and its Commissioner of Education, the school district moved the court to reapportion the costs spent and to be spent to desegregate. The lower court denied the motion holding that the Eleventh Amendment of the United States Constitution barred reimbursement and, alternatively, that the TEA was not responsible for the segregation, Appendix A.

The United States Court of Appeals for the Fifth Circuit affirmed on two grounds. First, it believed that the segregated conditions within the LISD were not caused by

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[3]The lower court proceeded to find other schools unconstitutionally segregated. However, those schools discriminated against hispanics. Unlike the situation involving blacks, Texas enacted no laws expressly compelling discrimination against hispanics.

[4]The Lubbock Independent School District has yet to be declared unitary. It, therefore, continues to expend funds to comply with the trial court's various desegregation orders.

the state's conduct. *United States v. Texas Education Agency,* 790 F.2d 1262, 1264-65 (5th Cir. 1986). Second, it held that the school district's motion "smack[ed] of an attempted end-run around the Texas legislature's allocation of state funds." *Id.* at 1265. Accordingly, the court of appeals believed that the lack of state responsibility and the applicability of the Eleventh Amendment warranted affirmance.

V.

REASONS SUPPORTING ISSUANCE OF WRIT

The decision rendered by the court of appeals erroneously construed the Eleventh Amendment and misapplied this Court's precedent. As a result, each school district statutorily coerced to segregate is prevented from seeking cost apportionment pursuant to *Milliken v. Bradley,* 433 U.S. 267 (1977).

a.

Authorities

Precedent authorizes trial courts to allocate among wrong-doers the cost of eradicating segregative school conditions. *Milliken v. Bradley,* 433 U.S. 267, 280-81 (1977); *Liddell v. Missouri,* 731 F.2d 1294 (8th Cir. 1984) *cert. denied,* U.S. (1984) *in passim; Arthur v. Nyquist,* 712 F.2d 809, 813 (2d Cir. 1983); *United States v. Board of School Commissioners,* 677 F.2d 1185, 1188-89 (7th Cir. 1982) *cert. denied,* 459 U.S. 1086 (1982). To the extent that the state *and her officials* created, maintained, or intensified the segregation they may be called upon to pay. *I d .*

i.

TEA Culpability

Contrary to the decision of the court of appeals, Texas, the TEA, and the Commissioner of Education were responsible, in part, for the segregation within the LISD. First, as found by the district court, Dunbar High School, Struggs Junior High, and Wheatley and Ella Isles Elementary Schools were segregated pursuant to state law. Appendix E at 3, 5, 9, & 13. These explicit findings were not altered by the trial court's 1978 opinion. *See United States v. Lubbock Independent School District, supra.* In the latter, the trial court noted that Ella Isles, Wheatley, Struggs, and Dunbar were segregated because of the district's "policy of transferring all blacks to this area prior to 1955, and gerrymandering the boundary lines of the all black schools...." *Id.* at 1229. the policy referred to in this passage was that mandated by the Texas Constitution and statutes. *See* TEX. CONST. art. 7 § 7; TEX. REV. CIV. STAT. ANN. art. 2900 & 2900a. Only with regard to the remaining LISD schools did the trial court consider post-*Brown v. Board of Education* gerrymandering. *See United States v. Lubbock Independent School District,* 455 F. Supp. at 1229-36. One cannot logically dispute that the State is responsible for the foreseeable consequences of its laws. *See Dayton Board of Education v. Brinkman,* 443 U.S. 526, 536 n. 9 (1979) (holding that the foreseeability of consequences is relevant evidence of discriminatory purpose and failure to eradicate prior unlawful conduct). Accordingly, the appellate court's interpretation of those findings, which interpretation absolves the TEA, is incorrect; Texas and TEA continued to be responsible for the segregation existent in at least Dunbar, Struggs, Wheatley, and Ella Isles.

Alternatively, the court of appeals ignored the precedent of *Keyes v. School District No. 1,* 413 U.S. 189 (1973) which directed courts to presume governmental respon-

sibility for discriminatory conditions if prior intentional segregative act was established. *Id.* at 210-11. No one can deny that Texas enacted laws directing school districts to segregate. It is equally indisputible that the Commissioner of Education was responsible for enforcing those laws. TEX. REV. CIV. STAT. ANN. art. 2654-5 § 5 (Vernon's 1965). Nor could the court of appeals deny that vestiges of state imposed segregation persisted in Lubbock through 1970. *United States v. Texas Education Agency,* 790 F.2d at 1264. These facts coupled with the *Keyes* holding required the courts below to presume that Texas and the TEA were culpable for the continued invidious discrimination. By refusing to apply this presumption and misconstruing lower court opinion, the court of appeals closed its eyes on the law and truth.

ii.

Inapplicability of the Eleventh Amendment

Contrary to the intimations of the court of appeals, the relief sought does not consitute an "end-run around the Texas legislature's allocation of state funds" or offend the Eleventh Amendment. This court previously held that the costs of desegregation may be allocated among state and local wrong-doers. *Milliken v. Bradley,* 433 U.S. at 280-81. The Eleventh Amendment stands as no bar to relief which substantially affects a state's treasury, such as that in *Milliken,* if the relief directly ends a violation of federal law. *Papasan v. Allain,*_U.S._,_, 106 S. Ct. 2932, 2940 (1986).

As in *Milliken,* the desegregation remedy ordered by the trial court below was necessary to end a violation of federal law. The directive issued subsequent to judicial findings of state culpability.[5] Accordingly, the pro-

[5]Under this circumstance, reimbursement would not contravene *Edleman v. Jordan,* 415 U.S. 651 (1974) since the relief was sought after a substantial adjudication of state responsibility. *See Edleman v. Jordan,* 451 U.S. at 668.

nouncements by the court of appeals concerning contravention of the Eleventh Amendment are erroneous and wrongfully preclude school districts across the south from recouping desegregation costs from their respective state officials.

CONCLUSION

Petition for writ of certiorari should be granted to correct this error.

Respectfully submitted,

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September 26, 1986

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

No. CA-5-806

The United States of America,

Plaintiff,

v.

Texas Education Agency
(Lubbock Independent School District), et al,

Defendants

ORDER

This suit was initiated by the United States Attorney General, in August of 1970, against the Texas Education Agency (TEA) and the Lubbock Independent School District (LISD) alleging that LISD had founded and maintained a segregated school system. Though TEA, a State agency, was named as a defendant, the State did not participate in hearings or other proceedings pertaining to the case.

This court by orders of January 29, 1978, April 3, 1978, May 8, 1978 and November 29, 1983, approved desegregation plans to be implemented by the defendant school district. The desegregation plans which were ordered and approved by the court were prepared solely by LISD. The State did not participate in the submissions.

LISD now petitions the court to compel the State (TEA) to divide the costs of implementing the ordered desegregation plans.

The Supreme Court in *Milliken v. Bradley,* 433 U.S. 267 (1977) *(Milliken II),* held that under some circumstances a State may be required to share the costs of implementing desegregation plans. In *Milliken II,* the State had been adjudged a participant in the constitutional violations responsible for the segregated system being challenged. The Court found that the Eleventh Amendment would not bar the claim against the State for moneys to be paid "as a necessary consequence of complaince *in the future." Id.* at 287, *quoting, Edelman v. Jordan,* 415 U.S. 651, 668 (1974).

Unlike *Milliken II,* the school district in the case now before the court did not seek to compel the State to share costs before the desegregation plan was initiated. Instead, LISD now seeks reimbursement for six years of desegregation plus division of future costs. The remedy sought in this case is much more closely akin to a monetary award against the State than the prospective cost sharing involved in *Milliken II. See Edelman v. Jordan,* 415 U.S. 651 (1974); *Pennhurst State School and Hospital et al v. Halderman et al,*__U.S.__, 52 USLW 4155, 4158 (1984) (suit against State agency is against the State).

Another important distinction between *Milliken II* and the case now before the court is that in this case, the State was not adjudged to be a participant in the constitutional violations. The issues before this court and the Court of Appeals concerned actions taken by the school board well after the State had abolished the dual education system. There is nothing in the record to indicate that the State was in any way responsible for the continued segregation of Lubbock schools. *See generally General Building Contractors Association, Inc. v. Pennsylvania et al.,* 458 U.S. 375 (1982).

Under the facts of this case, the court finds that the State is not liable for a part of the costs of desegregation.

Accordingly, the school district's Motion to Divide Costs is hereby DENIED.

The clerk will furnish a copy hereof to each attorney.

ENTERED this 21st day of March, 1985.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2356

D.C. Docket No. CA-5-806

United States of America,
Plaintiff-Appellee,

v.

Texas Education Agency,
Defendant-Appellee,

v.

Lubbock Independent School District
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas

Before THORNBERRY, POLITZ, and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee and defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

June 4, 1986

a true copy

Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ P. Keller
Deputy
New Orleans, Louisiana
July 14, 1986

ISSUED AS MANDATE: July 14, 1986

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-1265

United States of America,
Plaintiff-Appellee,

v.

Texas Education Agency,
Defendant-Appellee,

v.

Lubbock Independent School District,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(July 3, 1986)

Before THORNBERRY, POLITZ and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ **Carolyn Dineen Randall**
CAROLYN DENEEN RANDALL
United States Circuit Judge

APPENDIX D

TEXAS REVISED CIVIL STATUTES

Art. 2900a.

Dual school system; local option elections as to continuance or abolition; penalty

Section 1. That no board of trustees nor any other school authority shall have the right to abolish the dual public school system nor to abolish arrangements for transfer out of the district for students of any minority race, unless by a prior vote of the qualified electors residing in such district the dual school system therein is abolished.

Section 2. An election for such purpose shall be called only upon a petition signed by at least twenty per cent (20%) of the qualified electors residing in such district. Such petition shall be presented to such office or board now authorized to call school elections. Such an election may be set for the same date as the school trustee election in that district, if such petition is filed within ninety (90) days to such date, otherwise the official or board shall call such an election within sixty (60) days after filing of such petition. The election shall be conducted in a manner similar to that for the election of school trustees. No subsequent election on such issues shall be called within two (2) years of a prior election held hereunder.

Section 3. School districts which maintained integrated schools for the 1956-57 school year shall be permitted to continue doing so hereafter unless such system is abolished in accordance with the provisions of this Act. No student shall be denied transfer from one school to another because of race or color.

Section 4. Any school district wherein the board of trustees shall violate any of the above provisions shall be ineligible for accreditation and ineligible to receive any Foundation Program Funds during the period of time of such violation. Any person who violates any provision hereof shall be guilty of a misdemeanor and shall be fined not less than One Hundred Dollars ($100) nor more than One Thousand Dollars ($1,000). Acts 1957, 55th Leg., p. 671, ch. 283.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

NO. 5-806

United States of America,

Plaintiff

v.

Lubbock Independent School District;
Edwin H. Irons, Superintendent;
The Texas Education Agency;
Dr. J. W. Edgar, Commissioner of Education,

Defendants

MEMORANDUM OPINION

This suit was originally filed by the United States of America, through the Department of Justice, in the Dallas Division of this Court, and pursuant to a mandate of the Fifth Circuit Court of Appeals, the case was severed as to the Lubbock Independent School District and transferred, August 19, 1970, for an immediate hearing. The position of the United States of America is that the Defendant, Lubbock Independent School District, should show cause why it should not adopt a plan of pupil assignment in the School District in accordance with that proposed and attached to its Complaint. Pursuant to the mandate, conferences have been held between the Court and the attorneys involved and a full hearing on the merits of the matters in issue was heard before the Court on August 21st and August 22nd, 1970, and all parties introduced and presented testimony and exhibits to the Court.

In essence, the Government charges that the Defendant School District has operated and continues to operate a dual school system, separated as to races, in that there has been an assignment of students and faculty to schools in accordance with an of-

ficial state policy requiring racial segregation in the public schools. The evidence introduced by the Govenrment is intended to show that a vestige of the dual structure exists at Struggs Junior High School, Dunbar Senior High School, and in six of the District's elementary schools. The Defendant School District's reply and position is that each of these schools (elementary, junior high and high school), are assigned pupils strictly on a neighborhood school basis and that there is no such dual structure existing in the operation of the Lubbock Independent School District.

Immediately after Brown I[1], and for the school year 1955-1956, there was a total enrollment of 18,410 students in the Lubbock Independent School District and this had grown to 33,213 for the 1969-1970 year. It was comprised of 82.8% Anglo students in 1956 as compared with 67.51% in 1969-70; 8.33% Mexican-American in 1955-56 as compared to 20.84% Mexican-American in 1969-70; and 8.86% Negro in 1955-56 as compared to 11.50% Negro in 1969-70. Defendants argue that it is this growth and the shifting of populations that leaves this school system with schools that are either all black, or all Mexican-American, or substantially so. The percentage of racial enrollment in the schools at issue will be discussed later in this opinion.

If any of the schools in question were racially identifiable as to either Negroes or Mexican-Americans at the time of Brown I, and because of the operation of state law or policy, or if since such date they have become so racially identifiable as to racial minorities because of the acts of the Defendant School District, then it is required that school attendance boundary lines be redrawn in order to wipe out such vestiges of a dual school system in these schools and in the District prior to the 1970-71 school year. See *Green v. County School Board of New Kent County* 391 U.S. 430 (1968) and *Alexander v. Holmes County Board of Education* 396 U.S. 19 (1969).

Although the problems are inter-related and decision of a problem in one area affects that in another, it adds to an understanding of the situation to discuss the pupil assignment evidence and facts in three separate categories, that is, high school, junior high school, and elementary schools.

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[1]*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

HIGH SCHOOLS

The school in question is Dunbar High School which is located in the eastern portion of Lubbock and has been in its present position since 1958. Prior to that time, Dunbar was located about one mile west of its present location and the new building was built in 1958 with a capacity of 800 students, but when adjusted for special education classes would serve 773 students. At the present time, grades 9 through 12 inclusive are assigned to this school and it has unquestionably been an all-black school for many, many years, and was operated as a segregated black school under the laws that existed in the State of Texas prior to Brown I. In the 1969-70 school year there was an enrollment of 470; 457 or 97.24% were black, 1.91% Mexican-American, and .85% Anglo. This has been the situation prior to and since Brown I, when it was 100% black. The Defendant School District has attempted to correct this racial imbalance by increasing, at various times, the area to be included in the Dunbar School attendance zone, and has taken in several adjacent blocks, but, although their estimates at the time such steps were taken were that integration would be effected, it failed to materialize. For instance, in 1968-69 this District was enlarged in the southwest corner and there were an estimated 53 whites that would attend Dunbar, but at the time of registration, only 2 remained in this school zone. This is evidence of flight by white families that has existed out of this particular zone when the School Board affirmatively attempted to solve thei. dilemma. Nevertheless, Dunbar is a school that was traditionally operated as a segregated black school under the laws of the State of Texas and the vestige of a dual system, in which this school was segregated as black, remains to this day.

Briefly, the other high schools are Estacado, which was opened in September of 1967 with a new and excellent physical plant with a capacity of 1,600 students. At the time it was opened it had an enrollment of 881, 55.73% Anglo, 18.28% Mexican-American, and 25.88% Negro. In 1968-69 it had an enrollment of 924, 43.07% Anglo, 22.62% Mexican-American and 34.31% Negro; and in 1969-70 it had an enrollment of 1,038, 33.91% Anglo, 26.11% Mexican-American, and 39.98% Negro. The zone assigned to Estacado is uniform as to its geographical area and the residential pattern as to race in this area is substantially

that of the percentage of registration in the school. Estacado was carved out of the Lubbock High School District when Lubbock's population expanded in that direction at or about the time the school was commenced. I do not find that Estacado was ever operated as a segregated school, as the above figures indicate in the year that it was opened. Admittedly these percentages are changing, but the only explanation that can be gathered from the evidence before this Court is that it constitutes a flight of Anglo families from the area and an influx of minority groups and there is no showing of any conduct or act by the School District which causes it. However,this flight may not be as great as it appears, because in 1967-68 there were 491 Anglo students while there were 352 in 1969-70, and it was estimated that there would be a decrease of only 24 Anglo students in the 1970-71 school year. The particular situation found in Estacado is considerably muddled at this time due to the tragic tornado that struck just west of this area on May 11, 1970, and families who were displaced by the storm have moved into the Estacado area and there is no practical way at this time, prior to any registration, to know what the actual 1970-71 figures will be, but it cannot be said that Estacado is a segregated school or that there is any vestige of a previously operated dual school system as it was conducted at Estacado.

Lubbock High School: This high school is located almost in the geographical center of the City of Lubbock and has been in operation since the year 1931 with several additions being made thereto, the latest in 1961. All of the evidence points to the fact that this building is in excellent condition, costing less to maintain than other buildings, and was exceptionally well constructed and by all standards is a modern, excellent high school facility. Of course, in 1954 this was an all-white school, but the pattern has changed somewhat, although gradually, over the years and in 1969-70 there was a registration of 1,797, 64.83% Anglo, 33.89% Mexican-American and 1.28% Negro. This school has a capacity of 2,100. Since 1954 there have been changes in the boundary lines of Lubbock High School, the principal one being that Estacado was carved out of the District in order to give a neighborhood high school to the northeastern part of Lubbock, and to relieve crowding in Lubbock High School, all of which made it easier for students to attend a high school near their home, and to relieve congestion and crowding

at Lubbock High School. There have been other minor changes in the Lubbock High School attendance zones but these are minor in nature and have no racial assignment signficance whatsoever.

Two other high schools are Coronado and Monterey, lying in the western and southwestern part of the city, and these have been built to accommodate high school students in these areas, which has been the major direction of the expansion of Lubbock's population in its growth since 1955. In 1969-70 Coronado, with a capacity of 1,600, had an enrollment of 1,533, and Monterey, with a capacity of 2,100, had an enrollment of 2,000, both of which was substantially Anglo, with a percentage of 99% or better. These two high schools are located at points so as to serve the geographical area surrounding them and are not zoned in such a manner as would indicate that any minority group, who live within a reasonable distance thereof, would be excluded from attendance.

It is quite apparent from the above that the high school that still remains segregated because of pre-1954 laws and practices is Dunbar High School, although it is in a different location from what it was in 1954. It wall all-black then, and for all purposes is all-black today. The geographical area assigned to Dunbar High School appears reasonable from a geographical standpoint; the area assigned is comparable in size to that assigned the other high schools; it does not appear to be unreasonably shaped in an irregular manner; and it appears that the school is located within these geographical lines at a point best able to serve the population of the area. However, under *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968); *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969), and *Youngblood v. Board of Public Instruction of Bay County,*__F.2d__(5th Cir. 1970) (No. 29369, July 24), this is not sufficient to permit the continued operation of Dunbar without some changes to insure an integrated and unitary school. If this could be accomplished then the high school operation of the Defendants' high school would be on a unitary, Constitutional basis.

From the evidence and from the plans suggested by the parties in the evidence, this can probably be accomplished in one of the following ways:

1. Close Lubbock High School and assign its students to the

remaining four high schools, which, according to the plan of the Government, would give Dunbar an over-capacity enrollment of 860, of which 500 would be Anglo, 130 Mexican-American and 230 Negro. Admittedly this would make Dunbar a fully-integrated and unitary high school. However, the Defendant School District strongly object to this plan because the closing of Lubbock High School and the loss of its 2,100 high school student capacity would cause an over-all shortage in the remaining four high schools of some 500, and such a shortage would create serious problems for the School District, and secondly, there is no need for this building as an administration building for the system since one has recently been purchased and renovated, and further there has been widespread and determined opposition to the closing of this central school system. The opposition does not seem to be that it would cause any mixing of the races but because of the closing of a school in a logical location, with large capacity, excellent facilities, and many other conveniences.

There are other details of this plan but the principal portion would involve the closing of Lubbock High School as well as the adjustment of the lines elsewhere.

2. A change in the school attendance lines for Dunbar, and making it a three-grade high school (10-12), as well as resulting changes in the boundary lines of the other school districts to adjust to the change at Dunbar. Basically, the changes at Dunbar would move the west line from Avenues C and A to Avenue Q, and extend it southward to the South Boundary Line of the District. This would give Dunbar 730 students (under its capacity) with 300 Anglos, 130 Mexican-Americans and 300 Negroes. This is in accordance with the exhibit attached to the Complaint. Defendant School District objects to this plan because it does not feel that the extension of the boundary line westward would solve the problem since, from their past experience, they believe it would cause a flight of white families and would not give the desired integration effects at Dunbar. As will be seen later under the discussion on junior high schools, this necessarily causes further change in the school assignment areas of junior high schools since the 9th grade at Dunbar would be removed from the high school system and placed in a junior high school.

3. Another plan would be to close Dunbar and transfer these students to three of the high schools in Lubbock by equal distribution between Lubbock, Coronado and Monterey. Dunbar High School would then be made into either a junior high school or a 9th grade school for that and other adjoining areas. This plan is desirable in that it removes any vestige of a dual system from the Dunbar segregation situation, would successfully integrate Lubbock, Coronado and Monterey High Schools, all of which have insignificant numbers of black students, and would solve the problem of any "flight" that might thwart the efforts of the School Board to create and operate a truly unitary system. There are several drawbacks in that the burden would necessarily fall on the 10th, 11th and 12th grade students at Dunbar, who are essentially all black, and would cause busing of these students to the other three high schools in some instances, and unless careful attention was given would create a segregated school in either the 9th grade or junior high level in the operation of the old Dunbar High School. Another problem is that the enrollment at Dunbar, which is far less than its capacity, and the apparent downward trend of enrollment in Dunbar, indicates that the operation of this high school might not be feasible unless the attendance is increased. Economically and from the standpoint of administration, a high school with this few students would not be the ideal type of operation and its closing would foreclose any of these difficulties. The residents near Dunbar strongly oppose any closing of that school or change from a high school facility.

It is difficult, in the short time allotted to this Court, to determine which of the above three plans, or combination thereof, or perhaps another plan, would be most desirable. The disruption of the 1,700 students at Lubbock High School or even a less disruption of 470 students in number at Dunbar High School by closing either school is certainly not desirable if it can be accomplished in any other feasible manner.

The principal objection that the Court finds to Plan 2 above, which is the extension of Dunbar attendance zones, is that past experience reveals that "flight" might result, and Dunbar would, within a reasonably short time, again be a totally segregated black school which might still constitute a remaining vestige of the old dual system prior to 1954. However, the Plaintiff has proposed Plan 2 and according to its projections, Dunbar would be converted to a unitary and integrated school with

an equal number of Anglo and Negro students and a small number of Mexican-American students and at an enrollment of 730 which would be a much more efficient operation. There are, of course, disadvantages to Plan 2. Although it preserves a neighborhood school system in the high schools of Lubbock, Dunbar High School is located at the extreme north end of its assigned geographical zone. However, the evidence is clear that the black population presently being served by this school, and in fact the center of population of this particular area, even as extended, is in the north part of the zone and the south part is sparsely settled and populated at this time. This plan will avoid the disruption of upwards of 2,000 people in the Dunbar and Lubbock High Schools, if either one or both of them were to be closed or drastically changed. It maintains a geographical and neighborhood school plan as near as is practical under the circumstances. Under the evidence presented and by the tables attached to Plaintiff's Complaint, Dunbar will become a unitary school, and no high school in the Lubbock Independent School District will then have a minority race as a majority of its students. The evidence shows that over the years since Brown I the School Board has enlarged and changed the lines of Dunbar in an attempt to bring in more Anglo students to effect this purpose, and according to the Government's contention this plan, as it is submitted, will accomplish this. It does seem that if it is accomplished and Dunbar becomes an integrated school with no one minority race in predominant attendance, that this should finally dispose of the matter. All vestiges of a de jure segregated school population at Dunbar will be removed by this plan and it is felt that no further Court action will be required if this, in fact, is accomplished.

The Court will order, in detail, an adoption of this Plan 2 as to the High Schools of the Lubbock Independent School District. (See a supplemental opinion of this date which will modify this order.)

JUNIOR HIGH SCHOOLS

It can be seen that the removal of 9th grade students from Dunbar High School will place an additional load on Struggs Junior High School, which is within a few blocks of Dunbar and is presently operating as a junior high school with 7th and 8th

grade pupils. This school was erected in 1965 on a new site with a capacity of 500, but actually it, too, remains as a segregated black school because it in effect took over the grades of 7 and 8 of the old Dunbar operation. So this school, too, is a remainder and vestige of the dual operation in existence prior to 1954 and steps must be taken to alleviate this condition and correct it, even though Struggs is located within the geographical limits of its boundary lines at a point which fairly, adequately and equally serves all of the students within the area. In 1965, when this school was first opened, it was 100% black, and in the 1969-70 school year with a registration of 363, it remained 93.67% Negro, 4.68% Mexican-American and 1.65% Anglo. The surrounding neighborhood conforms with the attendance pattern as to racial context at the junior high school. The solution is not easy and is complicated by the fact that a 9th grade will be added to Struggs Junior High School, if a neighborhood concept is to be considered at all. The Plaintiff suggests that the west boundary line be extended to Avenue H from its present location along Avenues A and C. The Plaintiff has informed this Court, through its pleadings and evidence, that approximately 200 white students presently enrolled at Slaton and Atkins will attend Struggs, which with 363 now in attendance, plus the 9th graders in the area, will place Struggs considerably over its 500 pupil capacity.

Since Atkins and Slaton Junior High Schools will be relieved of 200 of the 7th and 8th graders, it would seem only reasonable that the 9th graders in the Struggs area should be assigned to these two schools. Further, the North Boundary Line of Struggs Junior High School should be 19th Street from H Avenue eastward to the East Boundary Line of the School District. That area formerly in Struggs, or optional, would be assigned to Alderson as to grades 7, 8 and 9 North of 19th Street and East of the arroyo and the extreme northwest corner of the old Struggs District would be assigned to Thompson as to grades 7, 8 and 9. Again, it is hard to determine what effect this will actually have due to the population shift caused by the May 11, 1970 tornado and due to the fact that the Government's figures are admittedly based on its 1968 survey. However, these are the figures before the Court and the ones it must accept and act on at this time.

This will make Struggs a junior high school accommodating 7th and 8th grade pupils in a geographical area that is uniform

in size and shape, and although Struggs is located on the north end of the area, it is almost equi-distant east and west. However, the population is to the north, and according to the information attached to the Plaintiff's Complaint, Struggs will have an enrollment of 490; 110 Anglo, 120 Mexican-American and 260 Negro, which gives it substantial integration, entirely opposite from its present 363 students of whom 93.67% are Negro, 4.68% are Mexican-American and 1.65% are Anglo.

No other changes are to be made in the attendance lines of junior high schools, as the Court feels that these boundary lines are fairly drawn without any consideration of assignment by race, are on a geographic zone or neighborhood school basis, and meet the proper criteria of the decisions. It is not alleged that any other junior high school is a remaining vestige of the old dual system in operation prior to 1954, and the Court finds no evidence that any other junior high schools are violating any decisions of the Courts. In those instances where junior high schools, in the Lubbock Independent School District, are predominantly Mexican-American or predominantly Negro, it is obvious from the evidence that they were not in that situation prior to 1954, and such minority predominance is not created because of any change in boundary lines made by the Defendant School District, or from any other act of the School District, but were solely created by a shifting population. As an example, Alderson, in 1963-1964, after it had opened in 1961, had 79.52% Anglo, 18.74% Mexican-American, 1.74% Negro, while in 1969-70 with an enrollment of 678 it had 26.11% Anglo, 34.66% Mexican-American and 39.23% Negro. There have been no substantial changes or alterations in the boundary lines of the Alderson Junior High School District since it first opened, and no other acts shown to have been committed by the School Board which would cause this and the only explanation is the shifting of the population as these enrollments have always reflected the residential pattern. Likewise, Matthews Junior High School which was opened in 1952-53 was mostly Anglo. In October of 1964 it had 74% Anglo, 25% Mexican-American and 1% Negro. In 1969-70 it had 24% Anglo, and 76% Mexican-Americans. Here again there has been no change of significance in the boundary lines that would cause this shift and change in the percentages, and no other act is shown to have been committed by the School Board that would have created this change in percentages, and the only reason assigned

is that of a shifting population in the residential area. This holds true for Carroll Thompson and Slaton, these schools all having higher ratios of minority groups than ordinarily might be desirable. However, if they were not in existence prior to Brown I or if the School Board has done nothing to create this imbalance since such date, no action should be taken to alter or change same, because the Courts have not been authorized by any decision known to this Court to change school attendance zones solely because of a moving population, and absence of State action causing a change from an integrated school.

Implementation of the above orders will create a unitary school system for the entire Lubbock Independent School District as to its junior high schools and will remove as segregated schools for minority races any of those schools which have been segregated because of prior law or traditions or because of the acts and conduct of the Defendant School District.

ELEMENTARY SCHOOLS

The Lubbock Independent School District operates 38 elementary public schools, most of which have grades 1 through 6 on separate campuses, although one has a joint campus with a junior high school. The evidence and contentions in this suit do not reveal any trace of a dual school system, prohibited by the Constitution, as being present in 20 of these schools. There was evidence before the Court that the remaining 18 elementary schools have a racial composition in which the Anglo-Americans are 50% or less and the other one-half or more of the population is either totally black, all Mexican-American, or a mixture of the two, and in several cases 100% black and 100% Mexican-American.

Twelve of these 18 schools, with less than 50% as Anglo-American, are in a similar category. As an example, Arnett Elementary School was built in 1954 for a predominantly Anglo-American neighborhood. In March, 1964, the composition of the student body was 83.84% Anglo-American, 16.16% Mexican-American, and no blacks. It is now less than one-half Anglo-Americans, while the remaining students are Mexican-Americans. Carter Elementary School has been operated for many years as a predominantly Anglo-American school but now is over 83% Mexican-American. McWhorter Elementary

School was predominantly Anglo-American in 1954, but now it is over 80% Mexican-American. Another example is Wolffarth Elementary School which had over one-half Anglo-American in 1964, and now is 17% Anglo-American and 82% Mexican-American.

The 12 schools, of which the above are examples, are elementary schools that were established either before 1954, or since such date, at a time to serve a population that was predominantly Anglo-American. Since the opening of these schools, population shifts have occurred to a point where these 12 schools are no longer predominantly Anglo-American, but in fact Anglo-Americans are in the minority and either blacks or Mexican-Americans, or a combination thereof, now constitute a majority in these schools. Although these schools might be suspect as presently being unconstitutional because of a predominant minority race in its enrollment, I do not find any remaining vestige of a school which had formerly been segregated by law. Residential patterns and a shifting population are the only causes of their present racial mixture.

The Lubbock Independent School District has consistently followed a policy of having the elementary schools serve approximately equal areas in Lubbock, consisting, where possible, of one square mile, and there is no evidence that the School Board has changed the boundary lines or done anything else to alter or change the composition of the student body of these schools by changing such boundary lines. The change in percentages from Anglo-American to Mexican-American or Negro has been caused solely by a shift in the population of the City of Lubbock during its rapid growth. The Court does not find these 12 schools are operated in an illegal manner or that there is a remaining vestige of an illegally operated dual system, as these schools just do not fit into this prohibited classification.

The other 6 elementary schools in Lubbock may present a different problem. It is these 6 schools that were especially referred to by the Plaintiff in its Complaint as being evidences of a remaining vestige of the old dual system. It would be best to examine these somewhat in detail, as all of them were specifically pointed out in the attachments to Plaintiff's Complaint:

1. Martin Elementary School: In October, 1969, it had a student body of 34.13% Mexican-Americans, 65.19% Negroes and 0.68% Anglo-Americans. This school was built in 1961 for a projected student body that would be predominantly Negro and Mexican-American and it has remained that way to this day. The School District built Martin School in an area where a

minority race was predominant and a segregated situation resulted, but if it had not been built in a segregated residential area it could have been avoided, but the School Board was only carrying out its policy of neighborhood schools in its elementary system, especially with regard to the area to be served of one square mile per school.

2. Posey Elementary School: In October, 1969, the student body at this school was 0.77% Anglo-American, 34.99% Mexican-American, and 64.24% Negro. The school was built in 1949 and in 1954 its student body was predominantly Anglo-American, and there was no segregation in effect at Posey at this time. I do not find, as the Plaintiff contends, that this school was created to further segregation, but in my opinion it should be added to the classification of the 12 above, as it was a shift in population that caused the changes here.

3. Wheatley Elementary School: In October, 1969, Wheatley was 100% Negro. This school was built in 1946 for a projected student body that would be wholly Negro, and the construction of this school in this location, similar to that of Martin perpetuated a segregated system that existed in this area at that time and has continued to exist since Brown I.

4. Ella Isles Elementary School: In October, 1969, the registration of students at this school showed 99.74% Negro. It was first built in 1935, although with subsequent additions in 1939, 1944, 1948, 1952 and 1959. It was wholly black in 1954 and has remained so ever since. Isles existed as part of the dual system prior to 1954 and constitutes a remaining vestige of an illegally constituted and operated elementary school as to race composition.

5. Guadalupe Elementary School: In October, 1969, this school was 100% Mexican-American and was built in 1961 for a projected student body that would be overwhelmingly Mexican-American. It was built in the area of two other schools, elementary as to grade, and which also had a predominantly Mexican-American population. This, too, fails the test, as it was built in an area and place that fostered and supported segregation rather than integration.

6. Sanders Elementary School: In October, 1969, there were 3.86% Anglo-Americans registered, 68.04% Mexican-Americans registered, and 28.10% Negroes registered. This school was built in 1925 and in 1954 its student body was

predominantly Mexican-American. This school is in the same factual situation as Wheatley, above, and was a part of the illegally operated dual system in 1954 and remains that way to this day.

I have named the above 6 schools specifically as they are the ones pointed out by the Plaintiff's Complaint as being those which contain visible evidence of the remaining vestige of the dual structure which had previously existed. Although all of them may not fit strictly into this category, and even though there might be other schools out of the 12 above mentioned that might conceivably fall in this category, the discussion given above is sufficient for the decision that the Court has reached in this respect.

The Government has suggested several alternative proposals to fully integrate the questioned schools. These proposals involve closing some of the schools and pairing.

However, the witness of the Government, Dr. Bell, an expert in educational affairs, testified that his plans would involve increased travel for the students and further, that many of them would be required to pass by a school they had previously attended, which had either been closed or paired, in order to reach schools to which they had been assigned under his plans. There is a dispute in the evidence as to the hazards facing students that would result from these changes, and although this is not at all a controlling factor with this Court, the existence of such traffic hazards is noted.

After examining all of the facts carefully regarding these elementary schools this Court is of the opinion that *Hightower v. West*, __F.2d__(5th Cir. 1970) (No. 29933, July 15, 1970) is controlling here. I agree that in the elementary schools of Lubbock that each child should attend the school nearest his home rather than traveling past it to another school and I cannot approve of the Government's proposed remedies in this area. The Lubbock Independent School District has made every reasonable and proper geographical zoning basis, without variance. It should also be noted as in *Hightower*, and under the order to be entered concerning the junior high schools and high schools, that each Negro and Mexican-American student will, during his secondary school career, be exposed to a fully-integrated and unitary school, especially in the junior high school and senior high school level.

The School Board's policy zones these elementary schools so

that, in most instances, no student is more than one mile from his school of attendance and new construction is attempted to be made at lines that are equi-distant between schools with a minimum of attention being given to natural barriers. Under these circumstances, the Court is of the firm opinion that the present system at the elementary level in Lubbock is permissible and will not be disturbed, even though it is recognized that some all-Negro elementary schools or all-Mexican-American elementary schools still remain.

STAFF AND FACULTY

Further, with respect to the composition of the staff and the teaching faculty of the Lubbock Independent School District, the Court recognizes that the changes to be ordered will necessarily require different teaching and perhaps different staff assignments. At this time there is not sufficient factual evidence before this Court for the Court to determine whether or not the ratio of the assignments to the various schools meets the requirements of law. The Court will order that the Defendant School District report to the Court on or before October 1, 1970, its information as to the assignments of faculty and staff as to race in order that the Court can determine whether or not they meet the requirements of *Singleton v. Jackson, et al,* (5th Cir. 419 F.2d 1211, opinion dated December 1, 1969). This is further necessitated by the fact that the recent storm in Lubbock will require different evaluations as to these assignments and the Court will not make any further order on this question at this time although jurisdiction will be retained as to all questions in this suit.

This opinion will constitute the Findings of Fact and Conclusions of Law by this Court in support of the order issued herein on August 22, 1970. But, the Court does here adopt as a part of its Findings of Fact the Government's Exhibit No. 1 and also the tables attached to and made a part of the study of the Lubbock School System which was attached to the Plaintiff's Combock School System which was attached to the Plaintiff's Complaint. Further, if any facts are not specifically found in this memorandum opinion, reference is made to the exhibits on file which are here adopted and found in further support of the order entered on August 22, 1970. There was very little dispute as to the factual data before the Court, and the Court is of the

opinion that the Order entered on August 22, 1970, is fully supported by the facts as here found and those appearing in the record.

Entered this 25th day of August, 1970.

HALBERT O. WOODWARD
United States District Judge

FILED
DEC 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-505

In the Supreme Court of the United States

OCTOBER TERM, 1986

LUBBOCK INDEPENDENT SCHOOL DISTRICT, PETITIONER

v.

THE TEXAS EDUCATION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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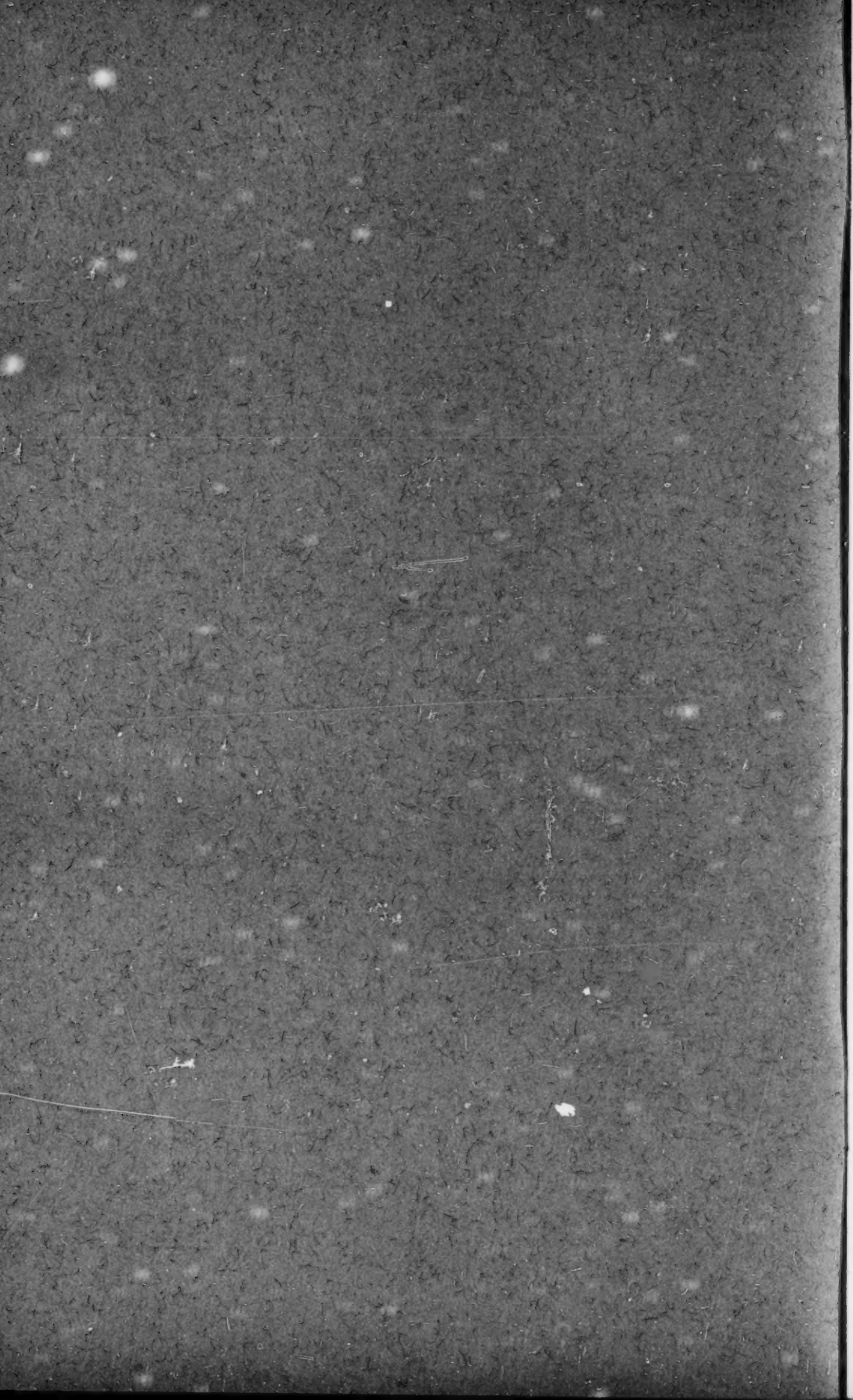

QUESTION PRESENTED

Whether part of the cost of a desegregation remedy should be assigned to a state education agency that has not been adjudged responsible for the underlying unconstitutional condition.

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OPINIONS BELOW

The opinion of the court of appeals (which is reprinted in an appendix to this brief) is reported at 790 F.2d 1262. The opinion of the district court (Pet. App. A1-A3) is unreported. Previous opinions of the court of appeals are reported at 431 F.2d 1313 and 600 F.2d 518. Previous opinions of the district court (Pet. App. E1-E16) are unreported and reported at 455 F. Supp. 1223.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986. A petition for rehearing was denied on July 3, 1986. The petition for a writ of certiorari was filed on September 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

1. The United States initiated this action in district court in 1970, demanding that respondent, Texas Education Agency (TEA), require six school districts, including

petitioner, Lubbock Independent School District, to prepare and submit appropriate school desegregation plans (App., *infra*, 2a). The actions against the various districts were subsequently severed, however, and the United States had to proceed separately against petitioner (*ibid.*). After a full trial, the court found that several schools in petitioner's district were "racially identifiable" (Pet. App. E3-E4, E9, E12-E14). The court did not determine what caused these particular schools to take on their racial character; it simply ordered petitioner to take specific affirmative steps to desegregate them (*id.* at E7-E8, E9-E10, E14-E15). Though TEA was nominally a party to this action, it did not participate in the proceedings and the court did not award any relief against it (App., *infra*, 2a, 3a). Petitioner did not appeal the court's judgment (*id.* at 3a).

In 1977, petitioner requested that the court permit it to implement a new building construction program (App., *infra*, 3a). The United States opposed this request and, instead, asked the court to order petitioner to further desegregate its schools (*ibid.*). After another hearing, the court agreed with the United States that petitioner had continued to segregate black and Hispanic school children and ordered petitioner to implement more extensive desegregation measures (*ibid.*). Again, though still named as a nominal defendant, TEA did not participate in the proceedings, was not adjudged responsible for the unlawful conditions, and had no relief directed against it (*id.* at 2a).

Not satisfied with the relief granted against petitioner, the United States sought review of the district court's order (App., *infra*, 3a). Accepting the United States' arguments, the appellate court remanded for a determination whether the additional segregation found in 1977 was the product of deliberate school board action. See *United States* v. *TEA*, 600 F.2d 518, 529 (5th Cir. 1979). The district court then entered additional findings, from which both peti-

tioner and the United States appealed (App., *infra*, 3a). While these appeals were pending, however, petitioner and the United States settled their dispute, submitted a proposed consent decree to the district court, and voluntarily dismissed the appeals (*id.* at 3a-4a). The district court approved the proposed decree in November 1983 (*ibid.*). TEA took no part in the negotiation of the decree, was not a party to it, and had no obligations under it (*id.* at 4a).

2. Nevertheless, in August 1984, petitioner filed a motion with the district court, which asserted that the State of Texas was partially responsible for the segregation within petitioner's schools and that TEA should reimburse petitioner for part of the costs of implementing the court-imposed desegregation remedies (see App., *infra*, 4a; see also Pet. App. A1). But the court found that "[t]he issues [previously] before [it] and the Court of Appeals concerned actions taken by the school board well after the State had abolished [its] dual education system" (Pet. App. A2) and that "nothing in the record * * * indicate[d] that the State was in any way responsible for the continued segregation of Lubbock schools" (*ibid.*). Accordingly, it refused to hold TEA "liable for a part of the costs of desegregation" (*ibid.*).

3. The court of appeals affirmed (App., *infra*, 1a-7a). It found that "the district court's original order in this case—the 1970 order upon which [petitioner] bases its entire argument—did not attribute responsibility for specific segregation to any [specific] defendant" (*id.* at 5a) and that, by contrast, "[t]he 1977 order * * * seems to indicate unmistakably that the only culpable party was [petitioner]" (*ibid.*). Furthermore, the court noted that petitioner "did not seek to recover any costs for the period between 1970 and 1977" (*id.* at 6a), the only period during which "the district court order even *arguably* pertained to the State of Texas; the 1977 and subsequent orders were explicitly directed at—and limited to—[petitioner]" (*ibid.* (emphasis

in original)). Accordingly, the court agreed with the district court that TEA had "never been adjudicated responsible for that segregation in Lubbock which has proven costly to eliminate" (*id.* at 7a), that petitioner's "belated effort to recover costs" was simply "an attempt[] [to make] an end-run around the Texas legislature's allocation of state funds" (*ibid.*), and that petitioner's motion to divide costs was without merit (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or with the decision of any court of appeals. Accordingly, further review is not warranted.

1. This Court has long held that federal courts may order defendants to remedy only those violations of federally secured rights for which the defendants have been held legally responsible. See *General Building Contractors' Ass'n* v. *Pennsylvania*, 458 U.S. 375, 397-401 (1982); *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976). Thus, this Court and the courts of appeals uniformly have allowed a state or its officials to be held liable for part of the cost of a desegregation remedy only when the state or its officials have first been found to have caused, in whole or in part, the constitutional wrong in question. See *Milliken* v. *Bradley*, 433 U.S. 267, 282-283 (1977); *Liddell* v. *Missouri*, 731 F.2d 1294, 1297 (8th Cir.), cert. denied, 469 U.S. 816 (1984); *Arthur* v. *Nyquist*, 712 F.2d 809, 810-811 (2d Cir. 1983), cert. denied, 466 U.S. 936 (1984); *United States* v. *Board of School Commissioners*, 677 F.2d 1185, 1186 (7th Cir.), cert. denied, 459 U.S. 1086 (1982). Since neither the State of Texas nor TEA has ever been adjudged responsible for the segregation in petitioner's schools, the court below was quite correct in holding that TEA may not be required to pay for part of the costs petitioner has incurred in desegregating its racially identifiable schools. See *General Building Contractors'*

Ass'n v. *Pennsylvania*, 458 U.S. at 400-401; cf. *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981) (no federal right to contribution, except in admiralty matters, without a statute authorizing such a remedy).

2. Petitioner errs in suggesting (Pet. 7-8) that TEA has in fact been found "culpable" for the segregation that petitioner has been required to remedy (and for the costs of which petitioner now seeks reimbursement). For one thing, neither the State of Texas nor TEA has ever expressly been held legally responsible for the "racial identifiability" of any schools in petitioner's district. While the district court's 1970 decree does suggest that vestiges of state-mandated segregation remained extant in Lubbock at that time (see Pet. App. E3-E4, E9, E12-13), the decree does not "indicate whether the actual segregation then [in] evidence resulted primarily from earlier state laws or from subsequent * * * gerrymandering of attendance zones" by petitioner (App., *infra*, 5a). By contrast, "[t]he 1977 order * * * seems to indicate unmistakably that the only culpable party was [petitioner]" (*ibid.*). In any event, as both the district court and the court below noted (see Pet. App. A1; App., *infra*, 5a-6a), "the money [petitioner] expended for purposes of desegregation (which it now seeks to recover) grew out of the district court's 1977 and subsequent orders" (App., *infra*, 6a), and those "orders were explicitly directed at—and limited to—[petitioner]" (*ibid.*). Thus, the costs that petitioner now seeks to recover clearly do not arise from remedies attributed to any acts of discrimination for which the State of Texas or TEA has formally been adjudged responsible.

3. Likewise, petitioner plainly errs in suggesting (Pet. 8-9) that the court below relied on the Eleventh Amendment in affirming the district court's denial of petitioner's motion to divide costs. The court referred to the Eleventh Amendment only once in its opinion—in describing one of the bases of the district court's holding—and clearly did

not base its decision on that Amendment. See App., *infra*, 4a. Rather, the court based its decision on the principle that a federal court should not order a party to remedy a constitutional violation for which that party has not been adjudged legally responsible. See *id.* at 4a-6a (discussing this Court's decision in *Milliken* v. *Bradley*, 433 U.S. 267 (1977)). As noted above, that principle is well established in this Court's case law. See *id.* at 282-283; *General Building Contractors' Ass'n* v. *Pennsylvania*, 458 U.S. at 397-401.[1]

4. As the plaintiff in this case, the United States has a significant interest in ensuring that the financial responsibility for ending school desegregation is properly allocated. Under the theory advanced by petitioner, every school district in the southern and border states which required separate schools for white and black children prior to 1954 could attempt to recover part of the costs of their desegregation remedies from their parent state school agencies, regardless of whether findings supporting liability of those agencies have been made, or whether the United States has ever sought to hold the state-level education officials or agencies liable. Reallocating the responsibility for desegregation remedies in this fashion, however, would simply discourage state school agencies from cooperating with the United States and from prompting local school districts to remedy the vestiges of their past discrimination. The court below properly declined to undermine the United States' enforcement efforts in this manner.

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[1] The court's suggestion (App., *infra*, 7a) that petitioner's "belated effort to recover costs" is an attempt to make an "end-run around the Texas legislature's allocation of state funds" is clearly *dictum*. In any event, the observation is not a statement that the Eleventh Amendment barred petitioner's motion, but rather an understandable rebuke of petitioner's morning-after litigation tactics.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1265.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

TEXAS EDUCATION AGENCY,
DEFENDANT-APPELLEE

v.

LUBBOCK INDEPENDENT SCHOOL
DISTRICT, DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

June 4, 1986

OPINION

Before: THORNBERRY, POLITZ and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

This case grows out of the Lubbock Independent School District's attempt to recoup from the State of Texas monies expended in an effort to desegregate schools in the district. The district court denied the school district's motion to divide costs. We affirm.

I.

The United States initiated this litigation when, in 1970, it sued the Texas Education Agency ("TEA") and six school districts in order to abolish vestiges of the dual school system in Texas. Following a limited appeal and this court's subsequent decision in *United States v. TEA*, 431 F.2d 1313 (5th Cir. 1970), the various actions were severed, so that the only school district involved in the present litigation is the Lubbock Independent School District ("LISD").

The TEA filed an answer in response to the United States' complaint in the suit against it and the LISD, but the TEA was not heard from again until the LISD filed a motion to divide costs in 1984. During the intervening years, despite the active status of the case as well as the issuance of numerous court orders pertaining to relief (filed in 1972, 1973, 1977, 1978, and 1983), the TEA was not involved. It was simply not a participant in the suit or its ongoing proceedings.

After a trial concerning the United States' original complaint in 1970, the district court found that certain schools in the LISD were unconstitutionally segregated. The court in 1970 did not delineate the reasons why particular schools remained segregated. The court did observe, however, that Dunbar High School "was traditionally operated as a segregated black school under the laws of the State of Texas and the vestige of a dual system, in which [Dunbar] was segregated as black, remains to this day." Likewise, the court found that Struggs Junior High School "is a remainder and vestige of the dual operation in existence prior to 1954." However, Struggs did not open until 1965. Of the four elementary schools found to be unconstitutionally segregated (Wheatley, Ella Isles, Guadalupe, and Sanders), the court found that two were unconstitutionally segregated with respect to blacks, and the other two with respect to Hispanics. The State of

Texas did not mandate even before 1954 that Hispanics be segregated; the LISD took this action on its own. And with respect to the black elementary schools—and the other unconstitutionally segregated black schools as well—the district court, while acknowledging that pre-1954 state law had, at one time, mandated separate schools, did not explain why the schools were still segregated in 1970, probably because the court was not called upon to do so.

Although the district court in 1970 did not specifically allocate or apportion the fault or the blame for the segregation in Lubbock between the LISD and the TEA, the court did order relief. That relief was directed solely at the LISD, not the TEA. Nevertheless, the LISD did not in 1970 file a motion for a division of costs, or anything similar. Neither party appealed from the order in 1970.

In 1977, the LISD sought permission from the district court to proceed with its building construction program. The United States opposed this request and also asked for supplemental desegregation relief, alleging that the LISD had continued to segregate blacks and Hispanics. The district court ordered further relief, *United States v. LISD,* 455 F.Supp. 1223 (N.D. Tex. 1978), *aff'd,* 601 F.2d 585 (5th Cir. 1979). Following the issuance of subsequent orders by the district court, the United States, not satisfied with the extent of the relief granted, appealed. This court remanded the case to the district court for further factual findings. *United States v. TEA,* 600 F.2d 518, (5th Cir. 1979). We instructed the district court to make specific inquiries in determining whether the segregation in certain schools which had once been integrated was a product of deliberate school board action. 600 F.2d at 529.

Following the remand, the district court entered further orders, from which both the United States and the LISD appealed. However, while the appeal was pending, the United States and the LISD agreed to settlement terms, so the appeals were voluntarily dismissed. The district court

entered a consent decree and order on November 29, 1983. This order reflected settlement negotiations between the LISD and the United States; the TEA was not involved. In addition, the relief ordered by the decree was directed, again, exclusively at the LISD, not the TEA.

Finally, the LISD filed a motion to divide costs in August, 1984, asserting that segregation within the LISD had been caused, in part, by actions of the State of Texas. The motion alleged that costs incurred in implementing the desegregation remedies approached $9 million. The district court denied the motion, explaining that the TEA had never been adjudged liable for the segregative acts which entailed the LISD's monetary expenditures, and that the Eleventh Amendment barred the recovery sought by the LISD against the State.

II.

The LISD argues that although it did segregate schools according to race, the responsibility for so doing was not its alone. The LISD acted in accordance with the law of the State of Texas. *See* Tex. Const. art. 7 § 7 (Vernon 1955); Tex.Rev.Civ.Stat.Ann. art. 2900, 2900a (Vernon 1965). Accordingly, the LISD asked that the district court use its equitable powers to apportion the costs of remedying segregation among the various parties responsible for creating it.

In *Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (*Milliken II*), the Supreme Court reviewed a court-ordered desegregation plan in which the district court directed that costs attributable to the plan be borne equally by the two groups of defendants responsible for prior constitutional violations: the Detroit School Board and the State of Michigan. 433 U.S. at 277, 97 S.Ct. at 2755. In affirming the remedy as well as the allocation of costs, the Court explained that the " 'condition' offending the Constitution is Detroit's de jure segregated school

system, which was so pervasively and persistently segregated *that the District Court found that the need for educational components flowed directly from constitutional violations by both state and local officials."* 433 U.S. at 283, 97 S.Ct at 2758 (emphasis added).

The LISD argues that the district court in this case did find, in 1970, that the segregation in the Lubbock schools—i.e., the unconstitutional condition—resulted from actions of the State as well as the LISD. Thus, the appropriate remedy, as exemplified by *Milliken II,* would be to divide costs between the LISD and the State of Texas. In effect, the LISD insists that the State of Texas not be permitted to escape the consequences of its own unlawful action.

The LISD's reliance on *Milliken II* as authorizing a division of costs in this case is misplaced for several reasons. Unlike the district court's findings in *Milliken II,* the district court's original order in this case—the 1970 order upon which the LISD bases its entire argument—did not attribute responsibility for specific segregation to any particular defendant. The district court did state, and it can hardly be denied, that vestiges of state-mandated segregation still remained extant in Lubbock in 1970. However, the court did not indicate whether the actual segregation then evidence resulted primarily from earlier state laws or from subsequent LISD gerrymandering of attendance zones. Significantly, though, the relief ordered by the district court was directly solely at the LISD, not the State. Moreover, and rather important, the relief ordered in 1970 proved virtually costless to the LISD; the LISD's effort to recoup money pertains to funds expended after the entry of the 1977 order.

The 1977 order, however, seems to indicate unmistakably that the only culpable party was the LISD. The State of Texas was not an active party to the proceedings in 1977-78. The district court's memorandum opinion and

order discusses only the segregative action of the LISD. The LISD gerrymandered school attendance zones and refused to take action which would have helped remedy that segregation which had been caused, in part, by pre-1954 state law. *See* 3 Record at 472-509. The court ordered the LISD to prepare a plan which would ameliorate segregation, and the LISD prepared and submitted a plan without, insofar as the record reflects, any assistance from the State.

The opinion of this court which reviewed the remedy ordered by the district court in 1977-78 evidences a recognition that the district court attributed segregation exclusively to "School Board action." 600 F.2d at 521. Specifically, the district court found in 1977 that the LISD's actions relating to student assignment, the drawing of attendance zones, and its decisions concerning school construction perpetuated and reinforced existing segregation and led, in addition, to further segregation. *See* 600 F.2d at 522-24. Our opinion did not disturb these findings.

As the affidavits submitted by the LISD attest, the money expended for purposes of desegregation (which it now seeks to recover) grew out of the district court's 1977 and subsequent orders. *See* 7 Record at 1077 (itemizing expenses for 1977-78 through 1982-83, and estimating expenses for 1983-84). The LISD did not seek to recover any costs for the period between 1970 and 1977. Yet it was only during that period that the district court order even *arguably* pertained to the State of Texas; the 1977 and subsequent orders were explicitly directed at—and limited to—the LISD.

III.

Finally, we pause to note the peculiar procedural posture of this case. The LISD certainly could have moved in 1977—or as early as 1970—for the district court to amend its judgment so as explicitly to adjudicate the State

of Texas' fault. *See* Fed.R.Civ.P. 60(b). Further, the LISD could have moved in 1977, once it became clear what the effort to desegregate would cost, that the court divide these costs among the parties deemed responsible for the then-existing segregation. *Cf. Milliken II,* 433 U.S. at 283. But the LISD pursued neither of these alternatives, and we express no view of what their proper resolution might have been. We are left instead with the LISD's belated effort to recover costs which smacks of an attempted end-run around the Texas legislature's allocation of state funds. Yet the State has not been an active party to this suit since 1970, and it has never been adjudicated responsible for that segregation in Lubbock which has proven costly to eliminate. Accordingly, the judgment of the district court is AFFIRMED.

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(3)

Supreme Court, U.S.
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No. 86-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LUBBOCK INDEPENDENT SCHOOL DISTRICT,
Petitioner

v.

THE TEXAS EDUCATION AGENCY,
TEXAS COMMISSIONER OF EDUCATION, and
THE UNITED STATES OF AMERICA,
Respondents

REPLY OF THE LUBBOCK INDEPENDENT SCHOOL DISTRICT TO THE BRIEF OF THE UNITED STATES OPPOSING CERTIORARI

REPLY TO BRIEF OPPOSING WRIT

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QUESTION PRESENTED

Whether a state previously found responsible for segregation in its public schools may be required to reimburse the local school districts for costs incurred in remedying the unconstitutional condition.

LIST OF PARTIES TO PROCEEDING BELOW

The Lubbock Independent School District, as Appellant, and the Texas Education Agency, the Texas Commissioner of Education, and the United States of America, as Appellees, appeared as parties before the United States Court of Appeals for the Fifth Circuit.

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NO. 86-505

IN THE

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October Term, 1986

LUBBOCK INDEPENDENT SCHOOL DISTRICT
Petitioner

v.

THE TEXAS EDUCATION AGENCY,
TEXAS COMMISSIONER OF EDUCATION, and
THE UNITED STATES OF AMERICA,
Respondents

REPLY OF PETITIONER TO THE BRIEF OF UNITED STATES OPPOSING CERTIORARI

I.

OPINIONS BELOW

The opinion of the court of appeals is reported at 790 F.2d 1262 and that of the district court, which is unpublished, is attached as Appendix A to Petitioner's application for certiorari.

II.

JURISDICTION

The judgment from which certiorari is sought was entered on June 4, 1986. The appellate court's order

denying rehearing was entered on July 3, 1986. Section 1254(1) of 28 U.S.C. confers upon this court jurisdiction to review the judgment in question.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article seven, section seven of the Texas Constitution prior to repeal in 1969 stated that:

> Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.

Article 2900 of the Texas Revised Civil Statutes prior to repeal in 1969 stated that:

> All available public school funds of the State shall be appropriated in each county for the education alike of white and colored children, and impartial provisions shall be made for both races. No white children shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The terms "colored race" and "colored children", as used in this title, include all persons of mixed blood descended from Negro ancestry.

Article 2900a of the Texas Revised Civil Statutes prior to repeal in 1969 is attached as Appendix D to Petitioner's application for certiorari.

IV.

STATEMENT OF THE CASE

The "Statement of the Case" contained in the

Lubbock Independent School District's application for certiorari adequately addresses the factual circumstances involved. Brevity suggests against its restatement.

V.

REASONS SUPPORTING ISSUANCE OF WRIT

In replying to the brief submitted by the United States, the Lubbock Independent School District (LISD) urges the following:

a.

Waiver of Right to Oppose

When originally filed on August 16, 1984, the LISD's motion to reallocate desegregation cost was served upon the United States. The district hesitated acting upon the motion for several months. During this period the United States submitted nothing to the trial court or Petitioner illustrating agreement or opposition. Having voluntarily waived opportunity below to raise claims, the United States should be precluded from doing so on appeal. The LISD, therefore, objects to all consideration of the United States' opposition.[1]

b.

Texas Education Agency and Commissioner of Education Culpability

State constitutional provision, *Tex. Const.* art. 7, §7 (Vernon's 1955), and statute, TEX. REV. CIV. STAT. ANN. art. 2900 & 2900a (Vernon's 1965), established dejure segregation. The memorandum opinion, rendered by the trial court in August of 1970, found

[1]The arguments which follow are made subject to this objection.

state responsibility for the continued segregation of LISD schools after 1954. (Pet. App. E p. 2, 9,13). Precedent buttressed those finding by interposing presumptive causation. *Keyes v. School District No. 1,* 413 U.S. 189, 209-11 (1973). The opinion rendered by the trial court in 1978 neither altered the initial findings against the state nor vitiated the *Keyes* presumption. (Pet. App. for Cert. p. 7). Sufficient culpability existed to authorize imposition of remedial cost upon the Texas Commissioner of Education.

c.

Default

The United States, through its "statement", suggests affirmance because neither the State nor its Commissioner of Education participated at trial or in settlement. (Brief in Opposition p. 2-3). Nonetheless, Texas, its Education Agency and Commissioner received citation and entered appearance. By choosing not to attend trial, those defendants created circumstances tantamount to default. Grievous injury to jurisprudence results if a defaulting party is allowed to escape liability by merely professing lack of involvement at trial.

CONCLUSION

The further one travels from history the more susceptible it grows to disguise. Texas, its Education Agency and Commissioner of Education have sojourned a long way. Yet, there lies fact in the August 1970 memorandum opinion none can disguise. Petitioner's then existing black schools remained as a tradition mandated by the laws of Texas. (Pet. App. E, p. 2, 9, 13). For this, all culpable, including the Commissioner of Education, must pay; therefore, certiorari must be granted.

Respectively submitted,

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